

NR 115

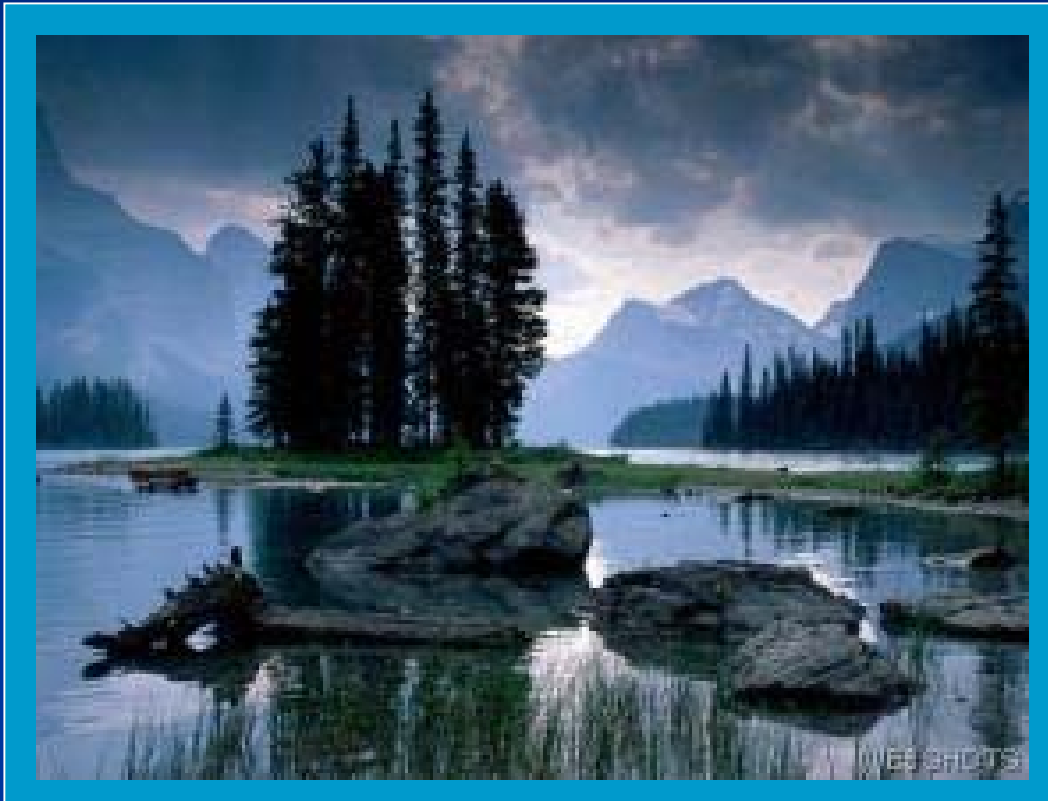
Scenic Beauty & the Beast

Rick Chenoweth, Ph.D.
UW-Madison
November 2002

Put yourself in this place



Turn to your neighbor and tell them, in a few words about what you see



What were you thinkin'?

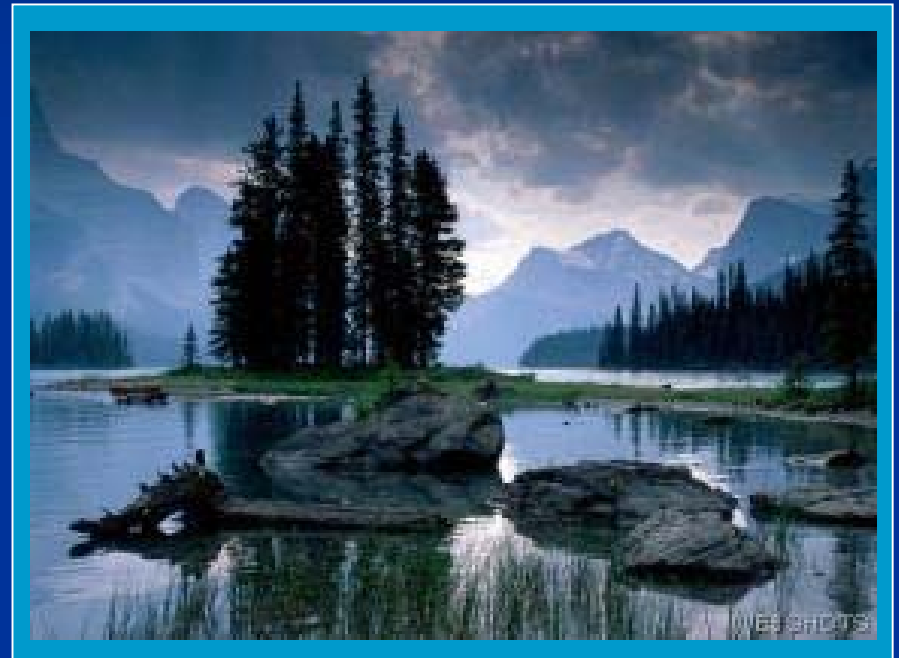
"Humm? What's the geology of this place?"

"What's the forest-cover type over there on the right?"

"Suppose there are any macro-invertebrates around here?"

"Looks like excellent fish habitat! "

"I hope someone is protecting the highly fragile littoral zone!"



What did your neighbor say?



It's Beautiful!

Major Topics

- Legal foundations for aesthetic controls
- Wisconsin law and aesthetics
- The Lower Wisconsin State Riverway
- Current NR115 parameters are not enough to protect scenic beauty
- Some concepts from the U.S.F.S. Scenery Management System
- Visualization tools should play an important role in developing aesthetic performance standards and in decision making

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Legal foundations for aesthetic controls

- The subjectivity issue
- The vagueness-due process issue
- Aesthetics as part of the general welfare
- NEPA and the U.S.F.S. response:
The Scenery Management System

Subjectivity Issue defined

“Aesthetics is not a proper matter for regulation since it is subjective. Any law would be an arbitrary and capricious imposition of one set of tastes on those whose tastes are legitimately different. Therefore, it would be unconstitutional under the 14th amendment to the U.S. Constitution – the due process clause.”

Subjectivity Issue translated

- ❑ "There can be no consensus on aesthetic matters"
- ❑ "No aesthetic judgment is any more or less reasonable than another because no reference can be made to publicly ascertainable facts in support of an aesthetic opinion"

Subjectivity issue refuted

- There can be and often is a reasonable degree of consensus
 - Aesthetic assessment literature
 - Lower Wisconsin River – bluffs
 - 100% consensus not required
- Reference can be made to publicly ascertainable facts
 - Aesthetic assessment methods
 - Examples
 - U.S.F.S. Scenery Management System
 - Lower Wisconsin River studies

Vagueness – due process issue defined

- Aesthetic laws cannot be drafted that are sufficiently unambiguous to pass constitutional muster
- Ambiguous laws are an infringement of peoples' rights under the 14th amendment due process clause

Vagueness - due process refuted

- Examples of laws and regulations that affect natural scenic beauty are abundant
 - Billboard regulation
 - Special aesthetic protection laws
 - NR 115
 - NR 118
 - Other (e.g., wild and scenic rivers, rustic roads, etc.)
 - Community planning and zoning (e.g., Door County Zoning Ordinance)
- Government agencies have some degree of latitude in interpreting regulations (e.g. LWR Board)
- Lower Wisconsin State Riverway (Chapter 30, Wisconsin Statutes)

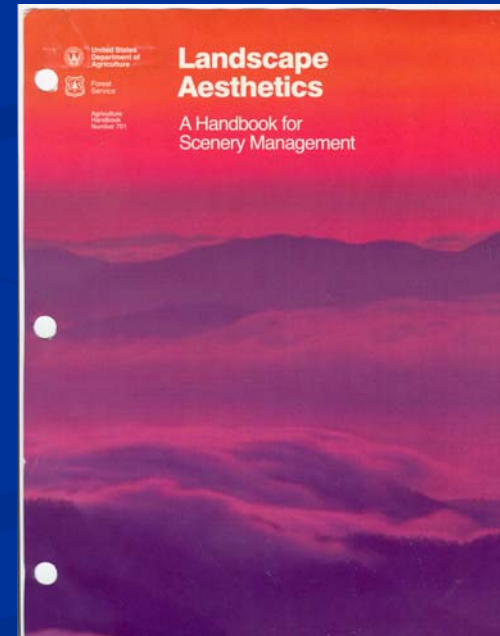
Aesthetics as part of the general welfare

“The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy

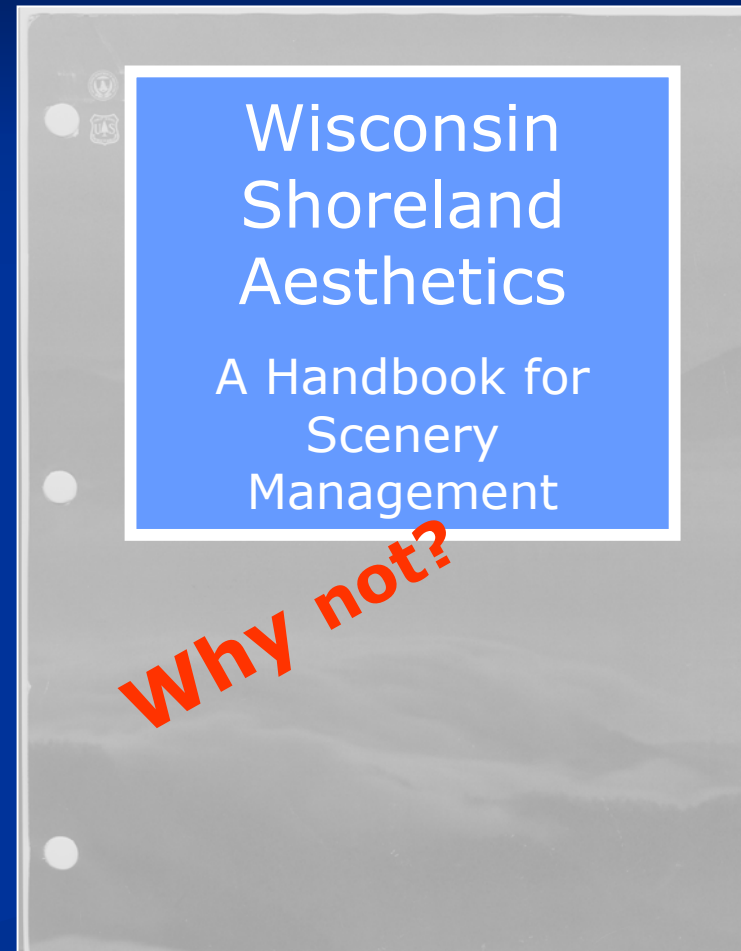
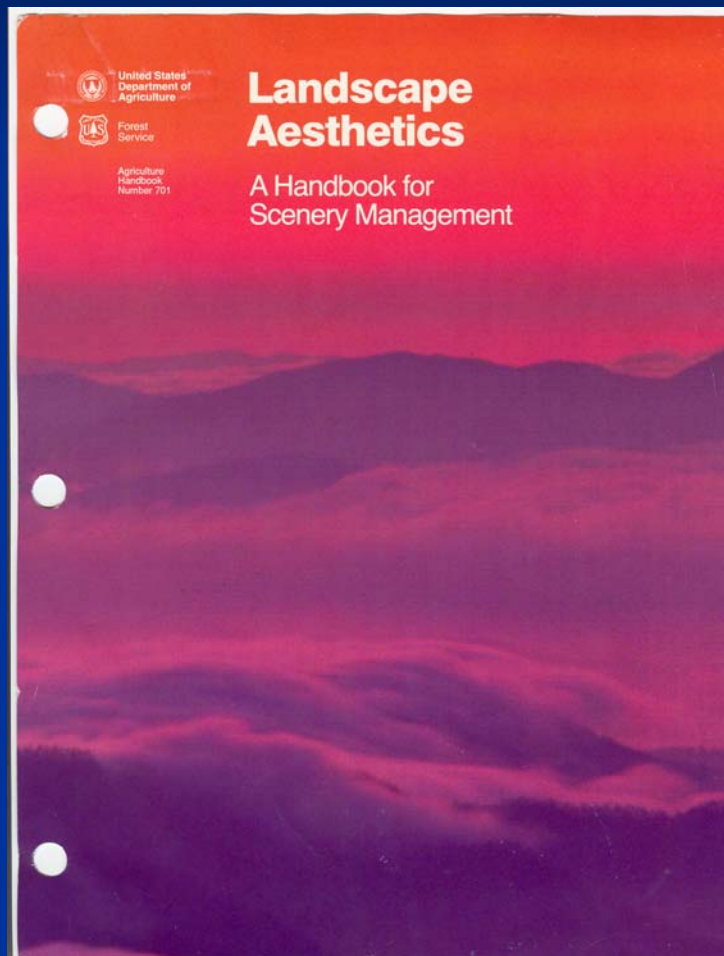
Justice William O. Douglas
Berman v. Parker, 1954

NEPA and the U.S.F.S. response: The Scenery Management System

- “. . . use all practicable means to assure for all Americans safe, healthy, productive and aesthetically and culturally pleasing surroundings”
- U.S.F.S. Scenery Management System



Wisconsin Shoreland Aesthetics Handbook



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Wisconsin law and aesthetics

- Northwest Ordinance and Article IX of the Wisconsin Constitution
- Public Trust Doctrine
- Muench v. PSC
- Kamarowski v. State
- Scenic Beauty and the permitting dilemma
 - Flambeau River case
 - Pelican River case

Wisconsin law and aesthetics



Under the Public Trust Doctrine, it is the ACTIVE DUTY of the state to protect public rights in the navigable waters of Wisconsin, including the right to the enjoyment of scenic beauty

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The Lower Wisconsin State Riverway

- Planning history
- The boundary & rationale issue
- 1980-81 Research
 - Surveys
 - Visitor-employed photography
 - The consensus issue
- Existing law could not have effectively protected the scenic features of the riverway
- Aesthetic provisions of the law
- LWR Board

Planning History

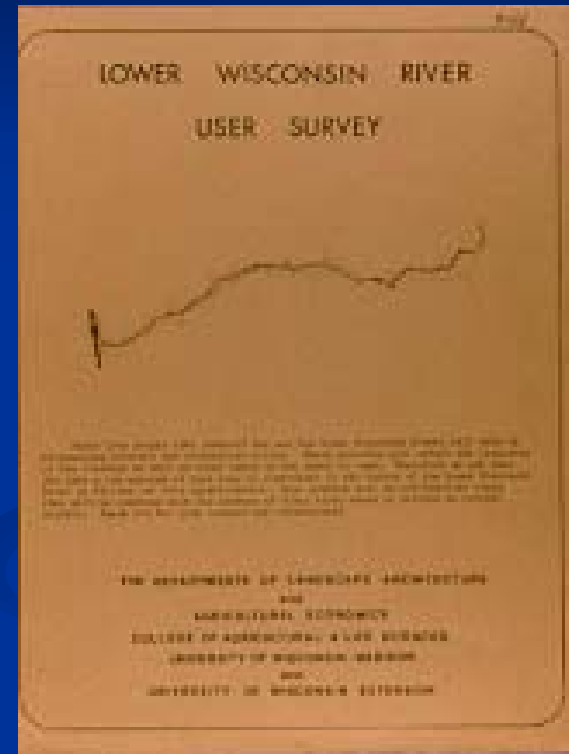
- Wild and Scenic Rivers Act
- DNR planning round #1
- DNR planning round #2
- Citizen's Advisory Committee
- Legislation creating the Lower Wisconsin State Riverway and the Riverway Board

Boundary & rationale issue



- Fishery – Shoreline to shoreline
- Wildlife – include low lands and wetlands
- Scenic Beauty – include bluffs visible from the river

1980-81 Research



Surveys

1980-81 Research

[illegible]

Visitor employed photography

Bluffs!!!!

Aesthetic provisions of the law: **“Visually Inconspicuous”**

- Sufficient vegetation before building
- Steepness of slope
- Location relative to bluff top
- Structure height relative to surrounding vegetation
- Exterior color of structures
- Reflectivity of materials

LWR Riverway Board



202 N. Wisconsin Ave
P.O. Box 187
Muscodas, WI 53573

www.lwr.state.wi.us

The Riverway law

“The Riverway law is indeed unique and innovative and is another example of the proud tradition of resource protection in Wisconsin. With the law in place, the people of Wisconsin are assured that the beauty and biological diversity of the river and its valley will remain for generations to come.”

Mark Cupp

Executive Director

Lower Wisconsin State Riverway
Board





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Current NR 115 parameters are not enough to protect scenic beauty

Compare to the Lower Wisconsin State Riverway law

The Big Four
Shoreland Management Issues

<i>Shoreland Buffers & Setbacks</i>	<i>Development Density</i>
	
<p>Current state standards are designed to protect a 35-foot deep buffer of vegetation along the shoreline. Property owners are allowed to clear a 30-foot wide corridor along every 100 feet of frontage. Most structures must be setback 75 feet from the ordinary high-water mark, unless there is an existing pattern of development with shorter setbacks.</p> <p>Concerns: Vegetation removal standards are ambiguous and difficult for local governments to enforce. They do not recognize unique uses such as forestry and agriculture. Most studies recommend a buffer of 50 feet or more to help protect water quality and fish and wildlife habitat.</p>	<p>Current state standards require an average minimum lot width of 65 feet on sewered lots or 100 feet on unsewered lots. Existing standards do not address the impacts of impervious (hard) surfaces such as roofs, driveways, and roads.</p> <p>Concerns: As shorelands become more developed, studies have found fewer green frogs and native songbirds along our lakes and rivers. At 52 homes per mile (110 foot wide lots), green frogs can disappear altogether. Research has found that when a watershed exceeds 15% impervious surface, water quality is degraded and fish communities are severely impacted.</p>
	
<p>Current state standards require counties to regulate nonconforming structures. In the past, many counties have limited the alteration, expansion, and repair of a nonconforming structure over its life to 50% of the structure's equalized assessed value. This is often referred to as the "50% rule."</p> <p>Concerns: The 50% rule is difficult for county staff to administer, track and enforce, and NR 115 doesn't specifically provide for other</p>	<p>Current state standards do not provide alternative development options for specific circumstances, such as substandard lots that do not currently meet minimum standards.</p> <p>Concerns: If minimum standards could be more responsive to specific circumstances, and property owners are willing to manage the impacts of their waterfront development, a balance could be struck between private property rights and natural resource</p>

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- Sufficient vegetation before building
- Steepness of slope
- Location relative to bluff top
- Structure height relative to surrounding vegetation
- Exterior color of structures
- Reflectivity of materials

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U.S.F.S. Scenery Management Concepts

- Existing Scenic Integrity
- Visual Absorption Capacity
- Constituent information
- Scenic Classes
- Visibility analysis
- Scenic Integrity objectives
- Scenery Management Handbook
- Lake classification
- Lake classification
- NR 115 public review process
- Aesthetic performance standards for each lake classification
- WDNR Guide to local establishment and enforcement of scenic quality objectives for lakes and rivers

Scenic Integrity objectives

- Preservation
- Retention
- Partial Retention
- Modification
- Maximum Modification
- Unacceptable modification



Powerline

This coastline of the Tongass National Forest in Alaska is paralleled by a major electric transmission line. The clearing width appears to be excessive. Although the clearing repeats the distinctive shoreline, it remains dominant in this natural landscape character of timbered slopes. The high contrast of the towers further emphasizes the clearing. It is rated **marginally acceptable**. In this situation, it may have been possible to minimize clearing limits and paint the towers a drab olive-green to bring the landscape up to **modification**.

U.S.F.S. Agricultural Handbook
Number 701 [p. H-52]

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Visualization tools

- Door County dockominium case
- Visualizing the effects of alternative performance standards on natural scenic beauty
 - Setback
 - Vegetative screening
 - Structure coloration
 - Erosion control and other water-related structures
- Requiring visualizations for decision making

Door County dockominium case



Idlewild Peninsula
Sawyer Harbor
Sturgeon Bay

Door County Zoning Ordinance

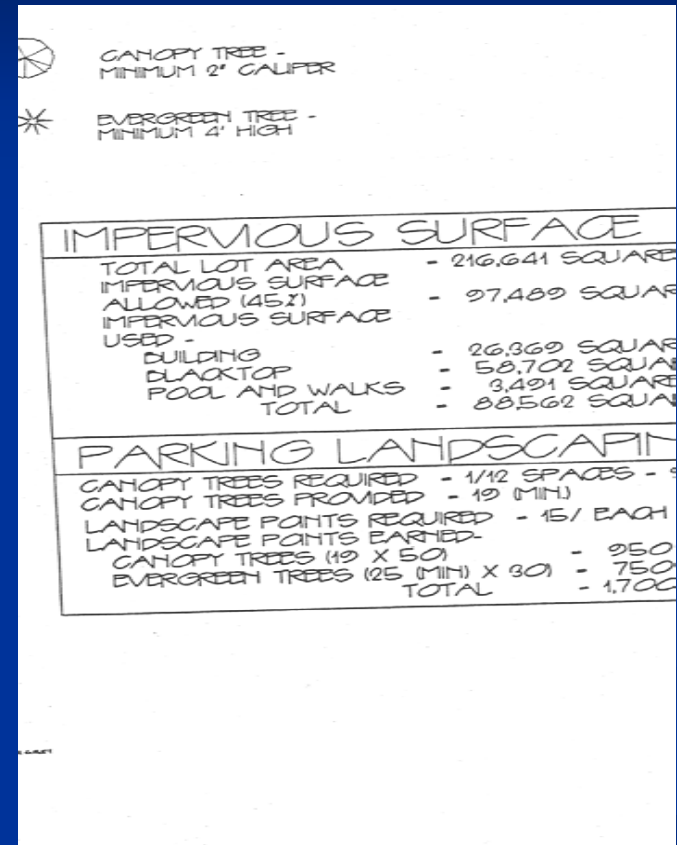
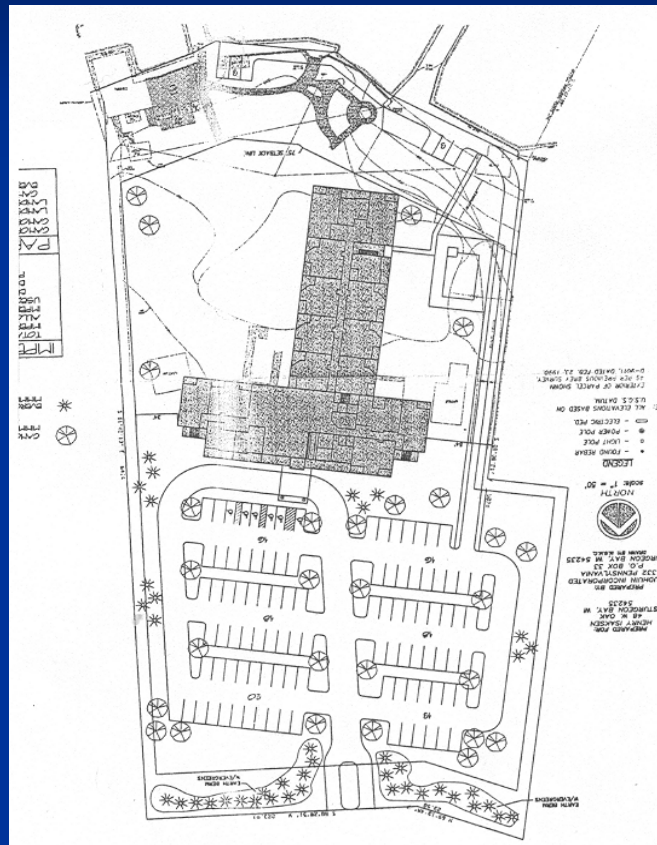
■ Procedures 11.04(5)(a)

- “. . . Detrimental or injurious to the public health, public safety, or the character of the surrounding area.”

■ Procedures 11.04(5)(b)(12)

- “Whether proposed buildings contribute to visual harmony with existing buildings in the neighborhood particularly as related to scale and design.”

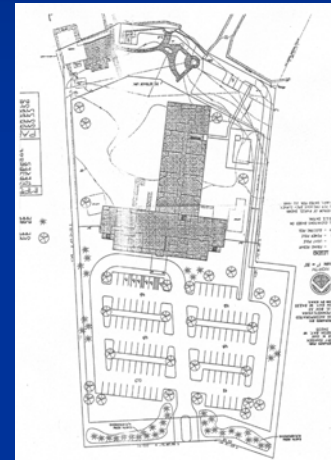
Schematic drawing for decision makers



To permit or not permit given the Door County Zoning Ordinance?



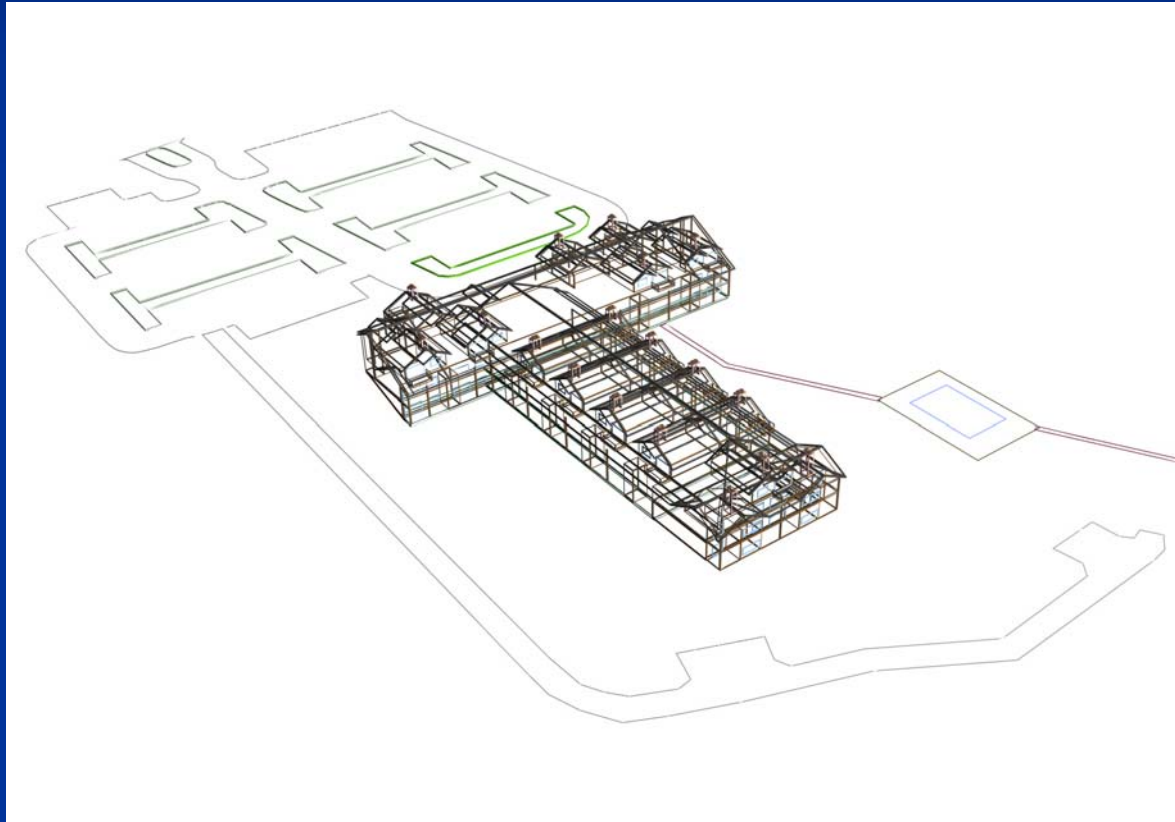
The site



Information
for decision
making

⊗	CANOPY TREE - MEDIUM & CALIFOR
*	EVERGREEN TREE - MEDIUM & HIGH
IMPERVIOUS SURFACE	
TOTAL LOT AREA	- 246,641 SQUARE
IMPERVIOUS SURFACE ALLOWED (45%)	- 111,192 SQUARE
IMPERVIOUS SURFACE USED -	
BUILDING	- 26,960 SQUARE
BLACKTOP	- 50,702 SQUARE
POOL AND WALKS	- 9,654 SQUARE
TOTAL	- 87,316 SQUARE
PARKING LANDSCAPE	
CANOPY TREES REQUIRED - 1/42 SPACES -	
CANOPY TREES PROVIDED - 10 (8'x11')	
LANDSCAPE PONDS REQUIRED - 6' EACH	
LANDSCAPE PONDS PROVIDED - 250	
CANOPY TREES 10' X 8'0"	- 250
EVERGREEN TREES 10' X 8'0"	- 750
TOTAL	- 1,000

Visualization tools for scenic quality decision making



Visualization tools for scenic quality decision making



Visualization of context



Dockominium from Potowatomi State Park



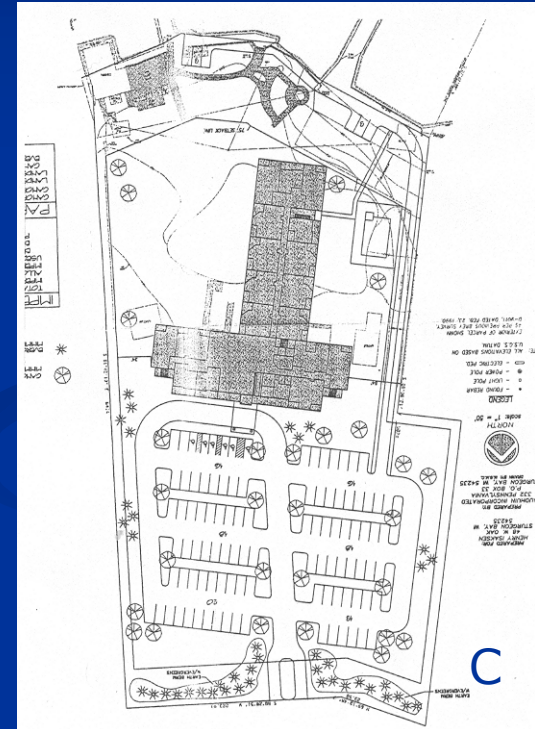
Is this detrimental to the character of the surrounding area?



Is this visually harmonious?

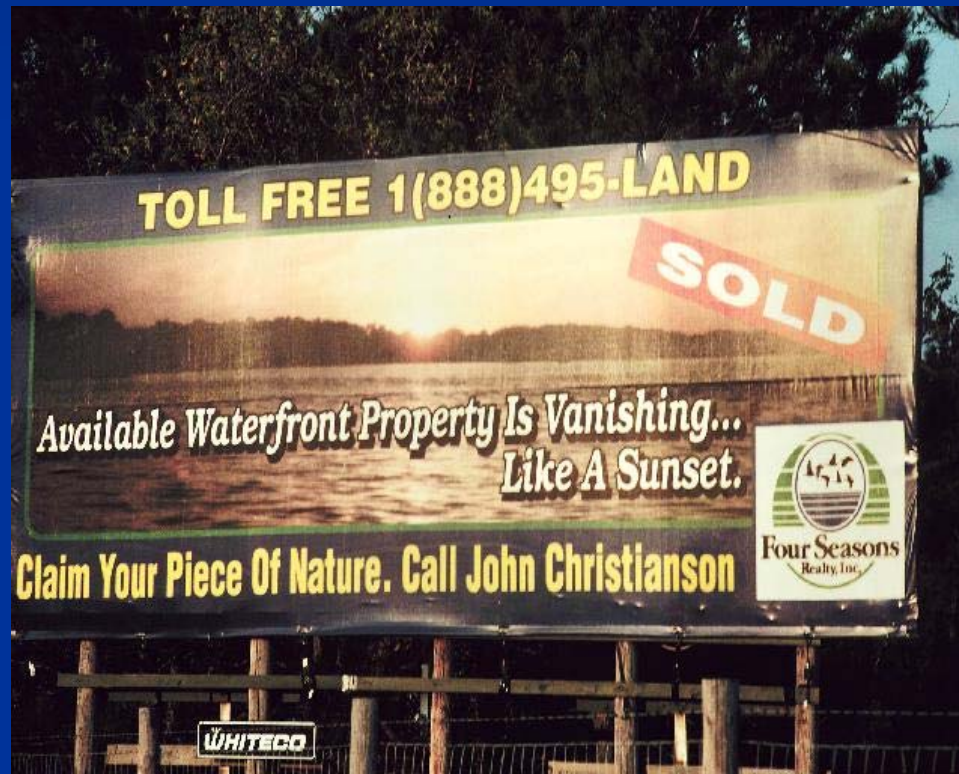


What visualizations would be most useful for determining “visual harmony” and consistency with the character with the surrounding area?



NR 115 Revision

An opportunity to better protect Wisconsin's scenic beauty



NR 115 Compliant Development



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NR 115 Compliant Development



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Original



Lighter color home



Original



Lighter home/setback/vegetation



Original



darker home/setback/vegetation



lighter home



lighter home/setback/vegetation

Do either of these protect the public right to natural scenic beauty?



Lot A



Lot B

The proper balance?





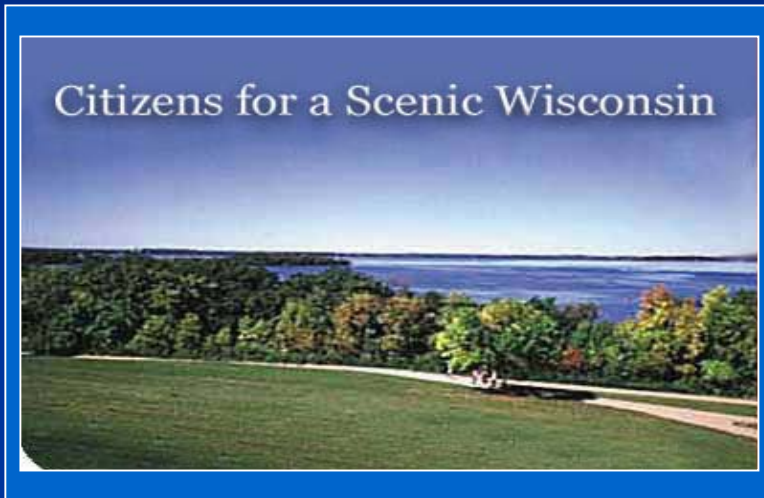
Insert NR 115 Revision
here

The proper balance?

Lotsa Luck!

Insert NR 115 Revision
here

For more information about protecting Wisconsin's scenic beauty



www.scenicwisconsin.org

Richard Chenoweth, Ph.D.

Department of Urban and
Regional Planning

University of Wisconsin-Madison

rechenow@wisc.edu